Supreme Court, U.S.
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No. 96-626

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GUY D. ADAMS, *et al.*,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In 1933, Congress rendered unenforceable obligations that require payment in gold or gold coins. *See* H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463). However, it subsequently rescinded that prohibition for obligations issued after October 27, 1977, *see* Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. § 463). The question presented is:

> Whether the court of appeals correctly held that gold clauses in corporate bonds issued in the nineteenth century are unenforceable under the 1933 statute as amended in 1977.

STATEMENT PURSUANT TO RULE 29.6

Respondent CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation, which is a publicly held company having no parent company. CSXT has the following nonwholly owned subsidiaries: Allegheny and Western Railway Company, The Baltimore and Cumberland Valley Rail Road Extension Company, The Central Railroad Company of South Carolina, The Cincinnati Inter-Terminal Railroad Company, The Cleveland Terminal and Valley Railroad Company, Dayton and Michigan Railroad Company, and The Home Avenue Railroad Company.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 80 F.3d 1377. The opinion and order of the district court (Pet. App. 16a) was filed on June 1, 1994, and is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1996. A petition for rehearing and suggestion for rehearing *en banc* was denied on June 24, 1996. On September 11, 1996, an order was entered extending the time to petition for a writ of *certiorari* to October 22, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue are: H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463), Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. § 463); 31 U.S.C. § 5118(d)(2); and Pub. L. No. 104-208, § 2609 (1996).

STATEMENT OF THE CASE

A. Introduction

This is the second of two class action lawsuits brought in the United States District Court for the Western District of Washington in 1993 to enforce gold clauses in publicly traded corporate bonds issued in the nineteen century. Pet. App. 6a-7a.[1] Twenty-three bondholders ("Petitioners" or "Bondholders") filed this action against CSX Transportation, Inc. ("CSXT"), as successor to Hocking Valley Railway Company ("Hocking Valley"), the issuer of the bonds. Petitioners contend that they are contractually entitled to payment of interest and principal in gold, although gold clauses in obligations issued before 1977 are unenforceable. *See* 31 U.S.C. § 5118(d)(2) (1994).

On June 1, 1994, the district court granted CSXT's motion to dismiss Bondholders' complaint under Rule 12(b)(6). The Bondholders' appeal to the United States Court of Appeals for the Ninth Circuit was consolidated with a similar appeal from the dismissal of their action against Burlington Northern. *Adams v. Burlington Northern R.R. Co.*, No. 94-35466 (9th Cir. filed June 22, 1994). The court of appeals unanimously affirmed the

[1] The first action by, *inter alia*, twenty of the twenty-three petitioners in this case was against Burlington Northern Railroad Co. ("Burlington Northern"). Styled *Adams v. Burlington Northern R.R. Co.*, Civil Action No. C93-1590 (filed November 15, 1993), it sought to enforce the payment of gold under nearly identical bonds and indentures at issue in this case.

rulings of the district court on April 10, 1996. Attempting to send these cases down separate tracks, the Bondholders filed a Petition for a Writ of *Certiorari* with respect to Burlington Northern, but, as to CSXT, sought *en banc* review by the Ninth Circuit. The court of appeals denied the petition for rehearing *en banc* on June 24, 1996.[2] This Court denied *certiorari* with respect to *Adams v. Burlington Northern R.R. Co.*, 65 U.S.L.W. 3084 (U.S. Oct. 7, 1996) (No. 96-51). Seeking a second review of the same appellate decision, the Bondholders thereafter filed their petition with respect to CSXT on October 21, 1996.

B. The Bonds at Issue

The Hocking Valley First Consolidated Mortgage Bonds (the "Bonds") were issued on March 1, 1899, with principal due on July 1, 1999, and interest payments semi-annually. App. 1a. Article Ten of the mortgage indenture securing the Bonds recognized the possibility of consolidations and mergers involving Hocking Valley over the 100-year life of the Bonds with Article Ten, Section 3 noting that the successor corporation "succeeds to and is substituted for [Hocking Valley] *with the same effect as if it had been named a party thereto*."[3] Emphasis added. However, the indenture, and supplemental indentures executed thereafter, did not provide for release of the original obligor on the Bonds. Moreover, any Bonds which had not been issued previously could be issued by the successor corporation, but the after-issued Bonds would be deemed to be issued in 1899.

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[2] Thereafter, the Bondholders sought an extension of time to petition for *certiorari*, and the extension was granted on September 11, 1996.

[3] Section 3 was not set out in Petitioners' Appendix. It is found in the Appendix hereto at App. 4a. The Bonds, the indenture and the supplemental indenture were referenced in the Complaint and were relied upon by both sides with respect to the motion to dismiss and considered by the district court. *See* Pet. App. 20a.

> "All the bonds so issued shall, in all respects, have the same legal rank and security as the bonds theretofore or thereafter *issued* in accordance with the terms of this Indenture, as though all of said bonds had been issued at the date of the execution hereof."

App. 5a (emphasis added).

Hocking Valley merged with The Chesapeake and Ohio Railway Company ("C&O") in 1930, and C&O executed a supplemental indenture whereby it agreed to "assume the due and punctual performance and observance of all of the covenants and conditions to be performed and observed by [Hocking Valley] under said First Consolidated Mortgage." App. 9a.

By 1980, C&O was wholly-owned by CSX Corporation, as was CSXT. In August, 1987, C&O merged into its sister company, CSXT, to form a single wholly-owned subsidiary of CSX Corporation. Finally, in 1992, as required by the original indenture, CSXT executed a supplemental indenture, retroactive to September, 1987, whereby it formally assumed the "due and punctual performance and observance of all of the covenants and conditions *to be performed and observed by Hocking Valley and C&O under the Mortgage,*" Pet. App. 5a; 28a-29a (emphasis added). As discussed below, at the time of the merger with CSXT, C&O was under *no* obligation to pay interest or principal on the Bonds in gold.

Of the original $20 million authorized issue, $15.8 million in face amount of the Bonds remain outstanding. Pet. App. 16a. There is no allegation that CSXT or its predecessors had ever missed an interest payment in the 95 years since the Bonds were first issued. No interest has been paid in gold since at least June 1933, when gold clauses were abrogated. The Bonds trade in the financial markets based on par, not at an amount which assumes CSXT is obligated to pay interest or principal in gold. Pet. App. 4a. If payments under the Bonds were required to be made in gold, they could increase the amount due

approximately 2000%, *id.*, with annual interest from 1987 to 1999 at $900 for every $1,000 bond, and a return of principal of $316 million.

C. Statutory Background

Until 1933, gold coin was legal tender and many debt instruments contained gold clauses providing for payment of a fixed amount of gold coin. *See Rudolph v. Steinhardt*, 721 F.2d 1324, 1325-1326 & n.7 (11th Cir. 1983).[4] Congress changed this state of affairs when, at the behest of President Franklin Roosevelt, it passed a series of measures in 1933 designed to reinflate domestic prices and increase the money supply in the wake of the Great Depression.[5] It adopted a Joint Resolution declaring gold clauses to be unenforceable, providing in § 1 that:

> "[E]very provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463) (hereinafter "Gold Clause Resolution"). All efforts to challenge

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[4] Under the Gold Standard Act of 1900, Cl. 41, § 2, 31 Stat. 45, one dollar was worth 25.8 grains of 9/10 fine gold. An ounce of gold was worth $20.67. *See Rudolph v. Steinhardt*, 721 F.2d at 1325.

[5] *See generally*, Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504, 509-10, 514 (1983).

this legislation failed.[6] It was not until 1977 that Congress relaxed the restriction with respect to gold clauses, but only prospectively. In that year Congress enacted a statute providing:

> "The joint resolution entitled 'Joint Resolution to assure uniform value to the coins and currencies of the United States', approved June 5, 1933 (31 U.S.C. 463) shall not apply to obligations issued on or after the date of enactment of this section." [7]

Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly —codified at 31 U.S.C. § 463) (hereinafter "1977 Amendment").

The legislative history to the 1977 Amendment makes clear that it was not intended to apply to bonds originally issued prior to the Amendment's adoption. Senator Jesse Helms, the sponsor of the 1977 legislation, noted in a statement on the Senate floor:

> "My bill, if approved, will make enforceable, gold clause contracts entered into *after* the enactment of the bill. *It is intended to stand neutral with regard to the enforceability of gold clause obligations issued in the past.* It has come to my attention that there is at least one case pending in the courts *which would require gold clause bonds issued before the 1933 resolution,* be paid in gold. Since this matter is in the courts, I would not want any legislation to prejudice the case one way or the other." [8]

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[6] *See Guaranty Trust Co. of N.Y. v. Henwood,* 307 U.S. 247 (1939); *Holyoke Water Power Co. v. American Writing Paper Co.,* 300 U.S. 324 (1937); *Norman v. Baltimore & O.R. Co.,* 294 U.S. 240 (1935).

[7] The sentence was reworded in a 1982 recodification at 31 U.S.C. § 5118(d)(2) as follows: "This paragraph does not apply to an obligation issued after October 27, 1977." Pub. L. No. 97-258, 96 Stat. 877, 985 (1982).

[8] 123 Cong. Rec. 633, 635 (1977) (emphasis added). Three months after Senator Helms' statement, the court in one of the

Senator Helms reaffirmed the prospective nature of the 1977 legislation when, in 1979, he offered legislation to provide relief to holders of certain pre-1933 gold instruments. He noted: "When I introduced the [1977] bill, which subsequently became law, I drafted it specifically so that it would *not* be applicable to the old obligations." [9]

In the wake of three decisions discussed *infra* at 11-12 which held that state law concepts of lease novation could create new obligations to pay in gold under *leases* originally executed before 1933, Congress passed legislation two months ago to seal shut this small crack in the 1977 legislation. On September 30, 1996, Congress amended Section 5118(d)(2) by substituting for the last sentence the following:

> "This paragraph shall apply to any obligation issued on or before October 27, 1977, *notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement.* Nothing in the preceding sentence shall be construed to affect the enforceability of

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cases pending at the time of his speech, *Feldman v. Great Northern Ry. Co.*, 428 F.Supp. 979, 987 (S.D.N.Y. 1977), held that railroad gold bonds issued prior to 1933 could be paid "dollar for dollar in legal tender of the United States" and not in gold. The *Feldman* decision recognized the prospective impact of the then pending legislation and that it would not "revive" the requirement to pay these obligations in gold. *Id.*

[9] Statement of Senator Helms, December 19, 1979, 125 Cong. Rec. 37112 (emphasis added). Senator Helms introduced legislation (S.2161) that would have *expanded* the 1977 Amendment to help those obligees who had entered agreements prior to 1933 in reliance upon a gold clause, such as a lessor, but *not* to aid holders of bonds purchased at prices not reflecting the value of gold. As he explained, "Over the years most of the bonds and securities have been traded at their face value—the dollar value . . . . [I]f Congress passed a law that said the gold clause was now enforceable, then Congress would be enacting a flat transfer of wealth as unjust as the initial 1933 Act." *Id.* His bill was not adopted.

> a Gold Clause contained in any obligation issued after October 27, 1977, if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1996."

Pub. L. No. 104-208, § 2609 (emphasis added).

D. Proceedings in the Courts Below

CSXT moved to dismiss the Bondholders' claims under Fed.R.Civ.P. 12(b)(6) on the basis that under 31 U.S.C. § 5118(d)(2) the Bonds' gold clauses were unenforceable. In response, the Bondholders asserted that their allegations of post-1977 corporate mergers and consolidations, and the execution of a supplemental indenture in 1992, were sufficient to withstand a motion to dismiss. They reasoned that such restructuring would cause a new "obligation" to be "issued" thereby reviving and resuscitating the gold clauses in the Bonds.

In his opinion dismissing the Bondholders' claim, Judge John Coughenour held that corporate bonds are "issued" only when first sold in the marketplace. Pet. App. 20a. The district court noted that the case was "strikingly similar" to the *Burlington Northern* decision recently rendered by the same court. Furthermore, the court distinguished the case from the opinion in *Fay Corp. v. BAT Holdings, Inc.*, 646 F.Supp. 946 (W.D.Wash. 1988), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990), which held a gold clause in a lease of real estate revived by a novation. "The 1987 merger and 1992 Supplemental Indenture agreement do not create a new agreement with the Bondholders so as to form a novation." Pet. App. 21a.

In an opinion by Judge Canby, the Ninth Circuit panel unanimously affirmed the district court's decision. In the consolidated appeal with the *Burlington Northern* case, the court of appeals framed the question as involving the "statutory interpretation regarding the meaning of the

term 'issued' in the 1977 Amendment." Citing *Rudolph v. Steinhardt*, 721 F.2d 1324, 1330 (11th Cir. 1983), which noted the 1977 Amendment's "construction of the word 'issued' corresponds with its normal meaning in law," the court of appeals concluded that "a bond obligation is 'entered into' or 'issued' when the bond first comes into the hands of a holder, is executed and delivered as to bind the obligor." Pet. App. 9a. Referencing the well understood meaning of bond "issue", the court "adopt[ed] this interpretation and [held] that bonds are 'issued' within the meaning of the 1977 Amendment when they are delivered to the first holder." Pet. App. 10a.

The court made clear that a *bond* "issue" was not somehow altered by reference to *lease* concepts of novation, thereby distinguishing the facts of this case from the lease considered in its earlier decision in *Fay* and from a more recent state court decision involving a lease, *Wells Fargo Bank v. Bank of America*, 32 Cal. App. 4th 424, 38 Cal.Rptr.2d 521 (1995).

> "Our response to this argument is much the same as our response to the contention that the sale of a bond constitutes a novation and new 'issue.' The date of issue of a bond is the date of first issue; the fact that the obligor has continued to be bound, or has agreed to continue to be bound, despite reorganizations and mergers, does not alter the controlling first issue date. Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue."

Pet. App. 11a-12a.[10]

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[10] The court further noted that even if novation analysis were appropriate, the supplemental indentures which were referenced in the pleadings showed that the formal requirements for a novation under state law had not been met. Pet. App. 13a. While contained in the portion of the opinion discussing the Burlington Northern bonds, the same issue had been raised by CSXT, and the court noted that "Adams' claim against CSXT fails for the same reason as his suit against [Burlington Northern]." Pet. App. 14a. The

The court below correctly noted that "the issuance of corporate bonds is subject to a well-developed, specialized body of law, and the general law of novation is not easily injected into that context." Pet. App. 12a. The Ninth Circuit concluded that, "We are unable to accept the view that Congress intended to alter so radically the obligation of bonds that have been in public circulation for nearly a century, when the language and history of its amendment suggests a contrary purpose." Pet. App. 13a.

REASONS FOR DENYING THE WRIT

There is no split in authority among the circuits with respect to the viability of gold clauses in pre-1933 corporate bond. Consonant with the other decisions considering this question, the court of appeals correctly held that the 1933 Gold Clause Resolution and the 1977 Amendment prohibit the enforcement of gold clauses in bonds first issued to the public days in the waning days of the last century. There is simply no "compelling reason" for *certiorari* under this Court's criteria as set forth in Rule 10.

Four months ago, the Burlington Northern petitioners challenged the appellate court's conclusion that the "gold bonds in *both* [Burlington Northern and CSXT] cases were obligations issued prior to October 27, 1977." (Pet. App. 15a. emphasis added). This Court denied *certiorari*. The arguments made here, including the purported split in the circuits, were among those made to this Court previously. The Bondholders raise nothing new now.

Bondholders argue that the execution of this particular supplemental indenture in 1992 breathed life into a moribund gold clause through concepts of novation. However, the courts below correctly concluded that novation analysis does not apply to these facts, and, even if it did,

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district court had previously found, "In this case, the allegations set forth in the complaint do not establish a novation." Pet. App. 21a.

the applicable requirements have not been fulfilled in this case.

Finally, any tenuous analogy to lease novation law has been eliminated now by the most recent amendment to 31 U.S.C. § 5118(d)(2). In short, the Bondholders' appeal has been rendered moot.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF THE STATUTORY PROVISION TO GOLD BONDS.

Since Congress adopted the Gold Clause Resolution on June 5, 1933, *no* court has held that bonds originally issued prior to that date must be redeemed now in gold. Although attempts have been made since the 1977 Amendment to apply the touch of Midas to bonds that have traded in the financial markets prior to 1933, all such efforts have failed.[11]

The Bondholders seek to create a spit among the circuits by citation to the Eighth Circuit decision in *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996). However, they fail to point out that the subject matter of that case, namely, a lease of real estate, presents a critical factual distinction from cases involving corporate bonds, a distinction already noted by the courts. The *Trostel* decision relied upon two other cases involving leases, *i.e.*, the *Fay* case which is from the same circuit from which Bondholders now appeal and the later state court decision in *Wells Fargo*. The court in *Wells Fargo* understood this fundamental difference by distinguishing

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[11] *See, e.g., Southern Capital Corp. v. Southern Pac. Co.*, 568 F.2d 590 (8th Cir. 1978), *cert. denied*, 436 U.S. 927 (1978); *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry. Co.*, 649 P.2d 947 (Alaska 1982); *Gold Bondholders Protective Council v. United States*, 676 F.2d 643 (Ct. Cl. 1982), *cert. denied*, 459 U.S. 968 (1982); *Schickler v. Santa Fe S. Pac. Corp.*, 593 N.E.2d 961 (Ill. App. Ct. 1992); *Adams v. Burlington Northern R.R. Co.*, 80 F.3d 1377 (9th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3084 (U.S. Oct. 7, 1996) (No. 96-51).

lease novations from the "legal structure of bonds," stating, "[h]owever, we note that a bond's 'date of issue' for determining when an 'obligation issued' (31 U.S.C. § 5118 (d)(2)) and applying a gold clause has been deemed only the date of the first purchase of the bond, not each purchase or delivery of the bond after its purchase." *Wells Fargo*, at 528 n.5. The court below distinguished the lease novation concept as applied in its earlier decision in *Fay* and in *Wells Fargo*:

> ". . . Adams points to cases in which novations rendered gold clauses in leases enforceable [citing *Wells Fargo* and *Fay*]. . . . Our response to this argument is much the same as our response to the contention that the sale of a bond constitutes a novation and a new 'issue.' The date of issue of a bond is the date of first issue; the fact that the obligor has continued to be bound, or has agreed to continue to be bound, despite reorganizations and mergers, does not alter the controlling first issue date. Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue. *See Wells Fargo*, 38 Cal.Rptr. 2d at 528, n. 5 (stating that novation doctrine applicable to leases would not apply to bonds)."

Pet. App. 12a. Noting that "bonds are financial instruments inherently different from leases, which were at issue in the cases that Adams cites," *id.*, the Ninth Circuit removed any question that it was at odds with its prior decision in *Fay* and the two later opinions that relied upon it. In short, all of the courts which have considered the question are in harmony. Simply put, there is no conflict to be reconciled.

II. BONDHOLDERS RAISE NO NEW ISSUES FROM THEIR PREVIOUS APPEAL.

Although the Bondholders contend that the previous appeal of the same decision with respect to Burlington Northern "presented questions distinct from the one pre-

sented here," Pet. 6, n.5, they fail to mention that their first petition for a writ of *certiorari* included the very issues raised here. The Bondholders raised the recent decision in *Trostel* in their reply brief in *Burlington Northern*, contending, as they do here, that a split exists in the circuits.[12] In a supplemental brief, Burlington Northern noted (1) that *Trostel* followed the *Fay* holding with respect to leases; (2) that there is a well understood distinction between bond and lease "issuance;" (3) that the novation analysis is inapplicable; and (4) that the court below clearly and properly recognized those distinctions.[13] There is simply no need to revisit the issue.

III. THE 1977 AMENDMENT HAS NO APPLICABILITY BECAUSE THE BONDS WERE "ISSUED" BEFORE THE AMENDMENT WAS ENACTED.

The Bondholders do not dispute that the Bonds were issued prior to 1977. The common law has long understood that bonds are issued as of the date noted on the bonds themselves from which interest accrues, or on the date the bonds are transferred to the *first* purchaser.[14] The

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[12] *See* Reply Brief for Petitioners, No. 96-51, filed September 20, 1996.

[13] *See* Supplemental Brief For the Respondents, No. 96-51, filed September 27, 1996, at 1-4. Analysis of the *Fay* and *Wells Fargo* decisions and the applicability of novation analysis had been discussed extensively in the previous briefs. *See* Petition for Writ of *Certiorari*, No. 96-51, filed July 9, 1996, at 13 and Brief for Respondents in Opposition, No. 96-51, filed August 9, 1996, at 17-19.

[14] *See Yesler v. City of Seattle*, 25 P. 1014, 1019 (Wash. 1890) ("In financial parlance the term 'issue' seems to have two phases of meaning. 'Date of issue' . . . usually means the arbitrary date fixed at the beginning of the term. . . . When the bonds are delivered to the purchaser, they will be 'issued' to him, which is the other meaning of the term.") *See also Gage v. McCord*, 51 P. 977, 979 (Ariz. 1898); *State National Bank v. Board of Commissioners*, 46 So. 307, 310 (La. 1908); *Whetstone v. City of Stuttgart*, 97 S.W.2d 641, 642-43 (Ark. 1936); *Hill v. Board of Eduaction*, 143 N.Y.S.2d 415, 418 (N.Y. App. 1955). This rule is unaffected by

treatise writers agree, noting that a bond obligation is "entered into" or "issued" when the bond first "comes into the hands of a holders, so executed and delivered as to bind the obligor." 6A Fletcher Cyc. Corp. § 2688 (1989). This common understanding has been codified in negotiable instrument law. Section 3-105(a) of the Uniform Commercial Code defines "issue" as "the *first delivery* of an instrument to a holder or remitter." Emphasis added. The court below recognized these long accepted precedents and applied them to the Burlington Northern and CSXT bonds. Pet. App. 9a-10a.

Cases applying the Gold Clause Resolution have recognized that Congress did not intend by its use of the phrase "obligation issued" to create a meaning different from normal usage. *See Rudolph v. Steinhardt,* 721 F.2d at 1330 ("[Helms'] construction of the word 'issued' corresponds with its normal meaning in the law, debts are normally issued when they are *first* entered into and made available to the creditor . . . .") Emphasis added.[15]

To sidestep this longstanding and well established interpretation of bond "issuance," the Bondholders seek to apply a universal meaning to the word "obligation," sever the supplemental indenture from the underlying bond and label the indenture a new obligation issued after 1977.

First, even those decisions which have applied the 1977 Amendment to resurrect old gold clauses did so within the varying restrictions of state law novation analysis and

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subsequent mergers. *See Estabrook & Co. v. Consolidated Gas Electric Light & Power Co.,* 90 A. 523, 524 (Md. App. 1914) (Once bonds are delivered and "beyond the power of the issuing corporation to recall" they have been "issued.")

[15] This Court has applied the similar phrase "obligation . . . incurred," which was the original language in the Gold Clause Resolution to mean the date "[l]egal rights and obligations came into existence when the contracts for purchase of the bonds were completed." *Guaranty Trust Co. of N.Y. v. Henwood,* 307 U.S. at 256.

did not apply a universal definition of "obligation." [16] Indeed, while Bondholders suggest, based upon a dictionary definition, that a mere promise to pay a debt would create an "obligation" within the meaning of the 1977 Amendment, Pet. 11, even the lease cases refused to go this far, requiring that a novation—and not just an assignment—occur.[17]

Second, the attempt to imply an obligation issuance by reason of the execution of a supplemental indenture separate and apart from the bond issuance would create the anomaly of multiple issuances with respect to the same bond. In *Gold Bondholders Protective Council, supra*, the Alaska Supreme Court refused to apply the 1977 Amendment to gold bonds issued by the Santa Fe Railway Co. in 1895. Plaintiffs claimed that their purchase of the bonds on the open market in 1980 effected a new obligation since each sale established a new relationship between the debtor and bondholder. As here, such an interpretation would have resulted in multiple "issuances" dependent upon a change in the relationship of the parties. The court rejected that notion: "We know of no authority which would consider each purchase of the bond after its first purchase to be a new 'issue' of the bond." 649 P.2d at 950.

Had CSXT recalled the old Bonds after 1977 and *reissued* new bonds to the public payable in gold, the analysis would be quite different. That did not happen. Certainty in the bond market demands that investors be able to rely on the face of a bond, as regulated by the applicable federal law, and not risk the impact of unknown, extraneous events such as the date of execution of a supplemental indenture or the fact of a merger. The indenture itself

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[16] *See Fay* (applying Washington lease novation law); *Wells Fargo* (applying California lease novation law); and *Trostel* (applying Iowa lease novation law).

[17] *See Fay*, 646 F.Supp. at 949 ("If the transfer to BAT was a mere assignment . . . BAT holds as assignee under the original 1929 contract, and the enforcement of the gold clause is barred.")

sought to avoid such anomalous results by expressly allowing mergers and consolidations, by treating later obligors as if they were the initial obligors, and by requiring that any later issued bonds be deemed to be issued in 1899. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982), *cert. denied*, 460 U.S. 1012 (bond obligations are "not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties").

In this case, the Bondholders' interpretation of "obligation issued" would have the 1992 execution of the supplemental indenture trigger a twenty-fold increase in bond value retroactive to 1987. The Bondholders conveniently fail to explain what happens to those individuals who owned Bonds in 1987, but sold before March 4, 1992. Pet. App. 30a. Apparently, only those persons owning the Bonds at the moment of execution of the supplemental indenture would reap all of the additional profits. The Bondholders' interpretation would also trigger an immediate transfer of wealth from the holders of CSX Corporations' equities to the Bondholders with no forewarning. It is precisely this kind of chaos in the financial markets that the 1977 Amendment was designed to obviate.

As the court of appeals properly noted, the novation analogy with its "readily ascertainable and stable parties who can engage in bargaining and mutual consent," does not work for bonds which are "regularly sold and purchased in large, impersonal markets, by corporations that frequently undergo corporate changes . . . ." Pet. App. 12a. To apply such concepts would "alter . . . radically the obligation of bonds that have been in public circulation for nearly a century, when the language and history of [the] amendment [to the Gold Clause Resolution] suggests a contrary purpose." Pet. App. 13a.[18]

[18] This point was also noted by Burlington Northern in its response to the Petition with respect to the court of appeals' opinion.

IV. THE ALLEGED FACTS DO NOT SUPPORT PETITIONERS' CLAIM OF A NEW OBLIGATION TO PAY IN GOLD.

A. CSXT Assumed Only the Liabilities of C&O, Which Did Not Include Payment of the Bonds in Gold.

Bondholders incorrectly assume that had the Ninth Circuit construed Section 5118(d)(2) as they would like, it "had no choice but to conclude that CSXT's assumption of C&O's obligations met the requirements for the issuance of a new obligation." Pet. 15. To the contrary, by merging with C&O, CSXT assumed C&O's liabilities, and no more. Under *Va. Code* § 13.1-721A(3), which governed this merger, "the surviving corporation has all liabilities of each corporation party to the merger."[19] This is consistent with the well-established rule that "[t]he debts and obligations which the new company becomes liable for by virtue of the consolidation and the taking over of the property of the old company are only those which are existing, valid and enforceable debts and obligations of the latter at the time of the consolidation." 15 Fletcher Cyc. Corp. § 7117 (1989). At the moment of its merger with and into CSXT, however, C&O was *not* obligated to pay the Bonds in gold. That obligation had been eliminated with the passage of the Gold Clause Resolution in 1933.

See Brief for the Respondents in Opposition, No. 96-51, filed August 9, 1996, at 19. While Bondholders dismiss the Ninth Circuit's analysis as mere "policy concerns" (Pet. 14), they neglect to note that it was made in the context of distinguishing its earlier decision in *Fay*, the decision which first applied the novation analysis that forms the cornerstone of Bondholders' so-called "split in the circuits." Further, it is these policy concerns which have convinced the courts to exercise "judicial caution" when considering Congress' intent with respect to requiring repayment in gold. *See, e.g., Feldman v. Great Northern Ry. Co.*, 428 F.Supp. at 986-987.

[19] As noted by the Interstate Commerce Commission, CSXT succeeded "to all of [C&O's] rights, assets, liabilities and obligations." *In Re The Chesapeake and Ohio Ry. Co. and CSX Transportation, Inc.-Merger Exemption*, 1987 WL99400 (I.C.C. 1987).

Execution of the supplemental indenture was a formality *required* by the original indenture and triggered by the merger, *see* App. 5a. The Bondholders ignore that the obligation CSXT assumed under the indenture was no greater than that of C&O. Article Ten, Sec. 3 notes that the successor corporation assumes the payment of principal and interest "with the same effect as if it had been named herein as a party hereto." *Id.* Had CSXT been named as the original obligor it would have been discharged from the obligation to pay in gold in 1933. As the court of appeals recognized, "[t]he original Hocking Valley Indenture specified that in the event of a merger the successor corporation would assume the same obligation as the original obligor." Pet. App. 14a.

The supplemental indenture signed by CSXT did *not* expressly obligate CSXT to pay interest and principal in gold. It simply "confirm[s] to the Trustee that [CSXT] has assumed the due and punctual payment of the principal and interest of the Bonds issued under the Mortgage," that CSXT promises to pay the bonds "according to their tenor," [20] and that CSXT promises to "assume the due and punctual performance and observance of all of the covenants and conditions to be performed and observed by Hocking Valley and C&O under the Mortgage." Pet. App. 29a. The supplemental indenture also expressly mentions Article Ten of the indenture, discussed in the previous paragraph.

Although the indenture did no more than put CSXT into the shoes of C&O, the Bondholders would have CSXT take off those shoes and put on a pair twenty times as large.

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[20] The phrase "according to their tenor" has been interpreted in similar gold bond instruments to refer to the *time* when payment is due, not to all of the original terms and conditions. *Arnoff v. Metropolitan Casualty Ins. Co. of N.Y.*, 289 N.Y.S. 833, 834 (1936).

B. Common Law Elements For Novation Were Not Met.

Assuming, *arguendo*, that novation analysis had any application whatsoever, an essential element of novation, namely, release of the original obligor, is missing. Neither the original indenture nor the supplemental indenture executed by CSXT contained any words of release, and the Bondholders did not allege a release. Although CSXT was "substituted" as an obligor, nonetheless the "substitution" of a corporation does not release the originl obligor.[21] Bondholders' claims below of the existence of a novation were rejected.[22]

V. BONDHOLDERS' CLAIMS UNDER A NOVATION THEORY ARE NOW MOOT.

The most recent amendment to 31 U.S.C. § 5118(d)(2) has now eviscerated the *Fay* line of cases by making clear that the abrogation of gold clauses in obligations issued on or before October 27, 1977, stands "notwithstanding any assignment or novation of such obligation after that date." The *only* exception occurs where "all parties to the assignment or novation specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-204, § 2609. As noted above, there is no mention of the gold clause in the supplemental indenture, and CSXT assumed only the obligations of C&O at the time of the merger which did not include payment in gold. The application of the Gold Clause Resolution and the 1977 Amendment by the court of appeals to the facts of this case was correct. To the extent Bondholders seek to fit these facts within a lease novation analysis, their argument has been foreclosed by Congress.

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[21] *See Alleco, Inc. v. IBJ Schroder Bank & Trust Co.*, 745 F.Supp. 1467, 1471-72 (D. Minn. 1989) ("[S]ubstitution and release are separate events. Substitution does not discharge the obligor.") *Compare Fay*, 646 F.Supp. at 949 n.5 (explicit words of release).

[22] As the Ninth Circuit noted, novation requires extinguishment of the old obligation. *See* Pet. App. 13a, n.4, 14a.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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November 15, 1996